Supreme Court, U.S.
FILED
DEC 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-902

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1988

JOHN A. BERSANI, *et al.*,

*Petitioners,*

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,

*Respondents.*

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## RESPONSE OF JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL

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Date: December 21, 1988

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# RESPONSE OF JOSEPH ROBICHAUD and CITIZENS IN SUPPORT OF ATTLEBORO MALL

Respondents Joseph Robichaud and Citizens in Support of Attleboro Mall, hereby file their response to the Petition for Writ of Certiorari filed by John A. Bersani, *et al.*, pursuant to Supreme Court Rule 19.6, and state that they support the instant petition.

Respondents Joseph Robichaud and Citizens in Support of Attleboro Mall intervened in the courts below as party plaintiffs-appellants in support of petitioners John A. Bersani, *et al.*, and also filed a Petition for Writ of Certiorari in the instant case on December 1, 1988, which was docketed as *Joseph Robichaud, et al. v. United States Environmental Protection Agency, et al.*, No. 88-929.

As noted in our petition, the EPA vetoed the fill permit on essentially two grounds: "[1] the avoidability of the loss [of

wildlife habitat] and [2] the significance of such areas in Massachusetts." *Robichaud* Pet. at 6 (citing to EPA's Final Decision at App. 107a). The Petition filed by John A. Bersani essentially focuses upon the first grounds of the denial insofar as the EPA's conclusion that the loss was avoidable was premised on the EPA's finding that there was allegedly an alternative site for the project available at the time Bersani entered the market. This "market entry" theory of determining whether there are practicable alternative sites is arbitrary and capricious as set forth in Bersani's Petition and we support that argument.

The petition filed by Joseph Robichaud focuses on the second reason articulated by the EPA for denying the permit, *i.e*, the cumulative loss of wetlands at sites unrelated to the site in question. We argue that such considerations violate the plain meaning of the Section 404(c) of the Clean Water Act, and therefore, the EPA acted outside of its jurisdiction.

Since both of the issues presented directly relate to the agency's stated reasons for denying the permit, we suggest that should certiorari be granted in these cases, that they be consolidated for purposes of briefing and argument.

Respectfully submitted,

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